

JAMES J. MANNO CONSTRUCTION,)	AGBCA No. 98-187-1
)	
Appellant)	
)	
Representing the Appellant:)	
)	
James J. Manno, Jr., <u>pro se</u>)	
James J. Manno Construction)	
RR 1 Box 249G)	
Ridgway, Pennsylvania 15853)	
)	
Representing the Government:)	
)	
Steven G. Reed)	
Office of the General Counsel)	
U. S. Department of Agriculture)	
200 North High Street, Room 209)	
Columbus, Ohio 43215)	

DECISION OF THE BOARD OF CONTRACT APPEALS

November 18, 1998

OPINION BY ADMINISTRATIVE JUDGE EDWARD HOURY

This appeal arose under Contract No. 50-5E34-7-78 between the Natural Resources Conservation Service, U. S. Department of Agriculture, and James J. Manno Construction of Ridgway, Pennsylvania (Appellant). The contract was for construction on the Chum Creek Emergency Watershed Protection (EWP) project located in Jefferson Township, Adams County, Ohio.

By facsimile dated August 7, 1998, Appellant filed its Notice of Appeal enclosing a copy of the Contracting Officer's (CO's) final decision dated May 4, 1998. On August 17, 1998, the Board docketed Appellant's appeal and questioned whether or not the appeal was timely filed. The appeal was received 95 days after the date of the CO's decision. In order for the Board to have jurisdiction under the Contract Disputes Act, the appeal must be filed within 90 days of the receipt of the CO's final decision. It was not apparent when Appellant received the decision. Appellant was requested to provide evidence regarding the date the CO's decision was received.

On September 10, 1998, the Board received a Motion to Dismiss and Memorandum in Support of Motion to Dismiss filed by the Government. In an Affidavit dated August 31, 1998, attached to the Government's Motion, the CO stated:

Affiant further stated that he issued his decision denying all of Appellant's claims on May 4, 1998, mailing the same to Appellant on that date.

Affiant further states that as evidenced by the copy of the Return Receipt attached hereto as "Exhibit 1", Appellant received said decision on May 8, 1998.

By letter dated September 2, 1998, to the Board, Appellant stated:

[S]ince Manno and the Contracting Officer had been discussing the Manno claim over the prior two weeks in lieu of Manno taking an appeal, Manno was told by the Contracting Officer that, Manno would be granted additional time to file the appeal if it was needed. . . . If despite the representations made to Manno, that Manno will be prejudiced with regard to pursuing its appeal on the merits, Manno, with the Court's permission, would prefer to withdraw the present appeal without prejudice and instead refile its claim directly in the United States Court of Federal Claims.

On September 14, 1998, the Board conducted a telephone conference call with the parties. The Government denied that the CO had made the representation indicated by Appellant. The Board stated that it could request affidavits and/or conduct an evidentiary hearing into the question of timeliness. Appellant stated that the discussions with the CO had been informal and that he would prefer to withdraw the appeal and file with the U.S. Court of Federal Claims. The Board advised Appellant that due to recent retirements it would be unable to officially dismiss the appeal until another judge was hired. Appellant was advised that this fact would probably not preclude the court from accepting jurisdiction so long as Appellant clearly indicated in a letter that withdrawing the appeal was what it intended.

By letter dated October 5, 1998, to the Board, Appellant requested that its appeal be withdrawn without prejudice to its right to file an appeal with the U.S. Court of Federal Claims. The Board hereby grants Appellant's request.

DECISION

The appeal is dismissed.

EDWARD HOURY
Administrative Judge

Concurring:

HOWARD A. POLLACK
Administrative Judge

JOSEPH A. VERGILIO
Administrative Judge

**Issued at Washington, D.C.,
November 18, 1998**